No. 17-587

In the Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT, PETITIONER

v.

JOHN GUIDO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY B. WALL
Deputy Solicitor General
MORGAN L. GOODSPEED
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

JAMES L. LEE
Deputy General Counsel
JENNIFER S. GOLDSTEIN
Associate General Counsel
ANNE NOEL OCCHIALINO
Acting Assistant General Counsel
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether the term "employer" in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, applies to all political subdivisions or only those with 20 or more employees.

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INTEREST OF THE UNITED STATES

This case concerns the proper interpretation of the definition of "employer" in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, as applied to political subdivisions. The Equal Employment Opportunity Commission (EEOC) is responsible for administering and enforcing the ADEA, which prohibits age discrimination in employment. 29 U.S.C. 623(a), 626(a)-(b). The proper interpretation of "employer" as to political subdivisions thus affects the EEOC's administration of the ADEA. The EEOC accordingly participated as amicus curiae in this case in the court of appeals.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. Congress enacted the ADEA to protect workers and applicants from "arbitrary age discrimination in employment." 29 U.S.C. 621(b). The ADEA makes it "unlawful for an employer * * * [to] discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). It also prohibits retaliation against an individual for filing a charge of or opposing age discrimination. 29 U.S.C. 623(d).

The ADEA initially governed only private-sector employers, as the statutory definition of "employer" did "not include the United States * * * or a State or political subdivision thereof." 29 U.S.C. 630(b) (1970). In 1974, however, Congress amended the ADEA to extend its protections to public-sector employees. See Fair Labor Standards Amendments of 1974 (FLSA Amendments), Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74. Since that time, the ADEA has provided:

> The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * * . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

29 U.S.C. 630(b). The statute separately defines the term "person" as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. 630(a).

2. a. In 2000, respondents John Guido and Dennis Rankin began working for petitioner Mount Lemmon Fire District, a political subdivision in Arizona. Pet. App. 3a. Respondents eventually were promoted to full-time firefighter captains. *Ibid.*; see *id.* at 19a. In 2009, petitioner terminated their employment. *Id.* at 3a. At the time, Guido was 46 years old and Rankin was 54 years old, making them petitioner's oldest full-time employees. *Ibid.*

b. Respondents filed charges of age discrimination with the EEOC. Pet. App. 3a. Following an investigation, the EEOC found reasonable cause to believe that petitioner had violated the ADEA. *Ibid.* Respondents then filed suit in federal district court, alleging that petitioner had discriminated against them based on their age, in violation of the ADEA. *Ibid.*; see *id.* at 19a-20a.

Petitioner moved for summary judgment. Pet. App. 18a. It contended that it is not an "employer" within the meaning of the ADEA because it had fewer than 20 employees during the relevant time period. *Id.* at 20a-21a. Respondents, meanwhile, contended that the 20-employee requirement in 29 U.S.C. 630(b) applies to private employers but not to States or political subdivisions. Pet. App. 21a.

The district court granted petitioner's motion. Pet. App. 18a-37a. The court agreed with petitioner that the ADEA's 20-employee threshold applies to political subdivisions as well as to private employers. *Id.* at 20a-26a. In reaching that conclusion, the court quoted at length

from the Seventh Circuit's decision in *Kelly* v. *Wauconda Park District*, 801 F.2d 269 (1986), cert. denied, 480 U.S. 940 (1987), which held that the ADEA is ambiguous but that the legislative history reveals Congress's intent to apply the 20-employee threshold to political subdivisions. See Pet. App. 22a-25a. Because the district court determined that petitioner "did not have the required 20 employees during the relevant time frame," it granted petitioner's motion for summary judgment and dismissed the case. *Id.* at 37a.

3. The court of appeals reversed. Pet. App. 1a-17a. Because the ADEA provides that the term "employer" "also means * * * a State or political subdivision of a State," 29 U.S.C. 630(b), the court of appeals first examined the "ordinary meaning" of the word "also." Pet. App. 7a-8a. The court explained that "[t]he word 'also' is a term of enhancement; it means 'in addition; besides' and 'likewise; too.'" *Id.* at 7a (quoting *Webster's New Collegiate Dictionary* 34 (1973)). "[I]n this context," the court concluded, "'also' adds another definition to a previous definition of a term" rather than "clarify[ing] the previous definition." *Ibid.* To buttress that conclusion, the court compared the ADEA to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 9a-10a. It reasoned that Congress "knew how to use language to ensure that an employee minimum applied to political subdivisions," and it used such language in Title VII—but not in the ADEA. *Id.* at 10a; see *id.* at 9a-10a & n.6, 13a.

The court of appeals acknowledged that several other circuits had declared Section 630(b) ambiguous. Pet. App. 11a (citing *Cink* v. *Grant Cnty.*, 635 Fed. Appx. 470 (10th Cir. 2015); *Palmer* v. *Arkansas Council on Econ. Educ.*, 154 F.3d 892 (8th Cir. 1998); *EEOC* v.

Monclova Twp., 920 F.2d 360 (6th Cir. 1990); *Kelly*, *supra*). But the court noted that those decisions "all rely entirely" on *Kelly*, which had failed to discuss "the statute's actual language" before "declaring that multiple reasonable interpretations exist." *Id.* at 11a, 13a. The court thus concluded that "there is no valid justification to depart from the plain meaning of the language" of Section 630(b). *Id.* at 14a. The court further noted that, even if the ADEA were ambiguous, *Kelly* had relied on legislative history that did not address the specific question at issue. *Id.* at 15a-16a.

Finally, the court of appeals rejected the argument that Congress must have intended to treat public and private employers similarly under the ADEA. Pet. App. 16a. The court explained that it could envision "plenty of perfectly valid reasons why Congress could have structured the statute the way it did"—such as the belief that governmental entities "can better bear the costs of lawsuits * * * or that government should be a model of non-discrimination." *Id.* at 16a & n.10. "In any event," the court concluded, "it is not our role to choose what we think is the best policy outcome and to override the plain meaning of a statute." *Id.* at 16a.

SUMMARY OF ARGUMENT

I. The ADEA defines the term "employer" to encompass political subdivisions, regardless of their size.

A. "As with any other question of statutory interpretation," the analysis must "begin with the text." *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016). The first sentence of Section 630(b) provides that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees." 29 U.S.C. 630(b). The second sentence then provides that "[t]he term ['employer'] *also means* * * * a State

or political subdivision of a State." *Ibid.* (emphasis added). Because the ordinary meaning of "also" is "in addition to," the second sentence defines an additional category of covered employers—namely, States and political subdivisions. Congress did not apply any minimum-employee requirement to that category.

The formulation that Congress chose in the ADEA was no accident: Just two years before amending the ADEA, Congress amended Title VII of the Civil Rights Act of 1964 to extend that statute, including its minimum-employee requirement, to governmental employers. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. It did so by defining governmental entities as "person[s]" subject to a 15-employee threshold, rather than defining governmental entities as a separate category of "employer." See 42 U.S.C. 2000e(a)-(b). When Congress later amended the ADEA, it chose a different path, consistent with the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, instead of Title VII. This Court "presume[s]" that Congress "acted intentionally" in adopting different amendments to Title VII and the ADEA. *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009).

Petitioner contends (Br. 17-36) that the rest of Section 630 requires that the phrase "also means" be read to signify "includes." But "includes" is not an available meaning of the word "also." At a minimum, it is not the ordinary meaning, and the two textual features that petitioner identifies do not justify a departure from that ordinary meaning. First, the term "person" in Section 630(a) does not cover States and political subdivisions, and it would not change the definition of "employer"

even if it did. Second, the inclusion of "agent[s]" in Section 630(b)'s second sentence introduces an additional category of employers, including entities to which an employer delegates employment decisions, and thus reflects the ordinary meaning of "also means."

B. The history of the ADEA amendments buttresses the statute's plain text. Congress added the relevant statutory language as part of legislation amending the FLSA, see FLSA Amendments § 28, 88 Stat. 74, on which Congress had modeled other aspects of the ADEA. That legislation extended the FLSA's coverage to "public agenc[ies]," regardless of their size. § 6(a)(1), 88 Stat. 58; see 29 U.S.C. 203(d). The same act also extended the ADEA to States and politica! subdivisions, regardless of their size. The relevant House and Senate Reports accordingly describe the ADEA amendments as "a logical extension of the * * * decision to extend FLSA coverage to Federal, State and local government employees." H.R. Rep. No. 913, 93d Cong., 2d Sess. 40 (1974); S. Rep. No. 690, 93d Cong., 2d Sess. 55 (1974).

C. Because Section 630(b) is clear, petitioner's resort to two structural canons of construction (Br. 36-43) is unavailing. Regardless, neither the federalism canon nor the constitutional-avoidance canon applies here. The selection of a one-employee versus a 20-employee threshold in a federal law that already regulates States and that subjects States to limited financial liability would not "upset the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). And the constitutional concerns that petitioner raises are not serious in light of this Court's existing Commerce Clause doctrine. See *EEOC* v. *Wyoming*, 460 U.S. 226, 243 (1983).

II. Finally, history refutes petitioner's fears (Br. 54-57) about the application of the ADEA to small political subdivisions. For more than 30 years, the EEOC has maintained that the term "employer" encompasses all political subdivisions, and it has accepted charges against such entities where appropriate. The majority of States also forbid age discrimination by political subdivisions of any size—including some States whose age-discrimination laws, like the ADEA, apply numerical thresholds to private employers. Despite those long-standing practices, small political subdivisions have not disappeared under crushing financial liability. And Congress remains free to craft additional exemptions to the ADEA if it believes that any substantial threat exists.

ARGUMENT

I. THE ADEA DEFINES THE TERM "EMPLOYER" TO ENCOMPASS POLITICAL SUBDIVISIONS OF ANY SIZE

A. The Text Of Section 630(b) Makes Plain That Political Subdivisions Are An Independent Category Of "Employer"

As this Court has repeatedly recognized, statutory interpretation "begin[s] with the text." *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016). If the "statutory text is plain and unambiguous," a court "must apply the statute according to its terms." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009). Here, the text of Section 630(b) clearly extends the ADEA's coverage to any political subdivision of a State.

1. The phrase "also means" defines an additional category of eligible "employer"

The ADEA prohibits an "employer" from discriminating based on age. 29 U.S.C. 623(a). Section 630(b) then defines a covered "employer":

> The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * * . The term *also means* (1) any agent of such a person, and (2) *a State or political subdivision of a State* and any agency or instrumentality of a State or political subdivision of a State, and any interstate agency, but such term does not include the United States.

29 U.S.C. 630(b) (emphases added).

On its face, Section 630(b) establishes three separate categories of "employer[s]." The first sentence defines one category of "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees." *Ibid.* The second sentence then sets out two additional categories of "employer[s]": (1) "any agent of such a person"; and (2) "a State or political subdivision of a State," along with certain other governmental entities. *Ibid.* The second sentence does not itself subject those two categories—agents and governmental entities—to the same 20-employee threshold that the first sentence applies to "person[s]."

As the court of appeals explained, see Pet. App. 7a-8a, 13a, Congress's use of the word "also" separates the two sentences. Because the term "also" was "left undefined by the statute, [it] carries its ordinary meaning." *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009). And the familiar dictionary definition of "also," in 1974 as now, is "[b]esides; in addition; likewise; too." *American Heritage Dictionary of the English Language* (1976); see, *e.g.*, *Webster's Third New International Dictionary* 62

(1966) ("in the same manner as something else: likewise"; "in addition: as well"); *Webster's New Collegiate Dictionary* 34 (1977) ("likewise"; "in addition: too") (capitalization omitted); *Merriam-Webster's Collegiate Dictionary* 35 (11th ed. 2005) ("likewise"; "in addition: besides, too"); *New Oxford American Dictionary* 46 (3d ed. 2010) ("in addition; too"). Because "also" is additive, Congress used the term to introduce other categories of eligible "employer[s]," rather than to clarify the category of "person[s] engaged in an industry affecting commerce who ha[ve] twenty or more employees." 29 U.S.C. 630(b).

Nor does the word "also" stand alone in Section 630(b). Congress paired it with the verb "means"—its ordinary tool for introducing the definition of a term. See *Burgess* v. *United States*, 553 U.S. 124, 130 (2008). As respondents observe (Br. 11-12 & n.2), many statutes use the phrase "also means" to introduce additional definitions. When Congress provided that "[t]he term ['employer'] also means * * * a State or political subdivision of a State," 29 U.S.C. 630(b), it thus created an additional, self-contained definition. If Congress had intended solely to clarify that the governmental entities described in Section 630(b)'s second sentence fall within the category of employers described in the first sentence, it might at a minimum have chosen a more "illustrative" verb, such as "includes," to suggest elaboration rather than definition. *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012); see, *e.g.*, 18 U.S.C. 229F(6)(A); 26 U.S.C. 3231(b) (Supp. IV 2016); 42 U.S.C. 10101(18).

This Court has previously acknowledged, at least in passing, the plain import of Section 630(b)'s text.

In *EEOC* v. *Wyoming*, the Court observed that "Congress extended the substantive provisions of the [ADEA] to employers having at least 20 workers, *and* to the Federal and State Governments." 460 U.S. 226, 233 (1983) (emphasis added), abrogated in part by *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000). And the Court made the same observation two years later in *Johnson* v. *Mayor & City Council of Baltimore*: "Congress extended [the ADEA's] coverage to Federal, State, and local Governments, *and* to employers with at least 20 workers." 472 U.S. 353, 356 (1985) (emphasis added). To be sure, neither of those decisions presented the issue here. But at least in describing the 1974 amendments to the ADEA, the Court has never paused over the ordinary meaning of the term "also."

2. Congress eschewed an obvious alternative formulation for extending the minimum-employee requirement

The language of the ADEA is particularly significant because Congress could have borrowed an alternative formulation from Title VII of the Civil Rights Act of 1964 to impose a numerical threshold on governmental entities. See Pet. App. 9a-10a. It did not. Instead, it extended coverage to all governmental entities—just as it simultaneously did for the FLSA.

Prior to 1972, Title VII and the ADEA defined "employer" in nearly identical ways. Title VII provided that "employer" means "a person engaged in an industry affecting commerce" with 25 or more employees, and "such term does not include * * * the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof." Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, § 701(b), 78 Stat. 253 (42 U.S.C.

2000e(b)). It defined "person" as, *inter alia*, an individual or corporation. § 701(a), 78 Stat. 253 (42 U.S.C. 2000e(a)). The original ADEA likewise defined "employer" as a person engaged in interstate commerce with 25 or more employees, and provided that "such term does not include the United States * * * or a State or political subdivision thereof." ADEA, Pub. L. No. 90-202, § 11(b), 81 Stat. 605. Also like Title VII, the ADEA defined "person" in Section 630(a) as, *inter alia*, an individual or corporation. § 11(a), 81 Stat. 605.

Despite those similarities, the 1972 Congress expanded only Title VII's coverage. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. It deleted from the definition of "employer" the exclusion for certain governmental entities. § 2(2), 86 Stat. 103. And it added to the definition of "person" in the prior subsection "governments, governmental agencies, [and] political subdivisions." § 2(1), 86 Stat. 103. Because Title VII regulates as "employers" only those "persons" with at least (as amended) 15 employees, and because Congress redefined certain governmental entities as "persons," the 1972 amendments plainly established that political subdivisions were subject to Title VII's 15-employee threshold. See 42 U.S.C. 2000e(a)-(b).

Two years later, a different Congress amended the ADEA. It did *not* follow the model set out in Title VII, by adding governmental entities to the definition of "person" in Section 630(a) and thus clearly subjecting those entities to a minimum-employee requirement. Instead, it modified the ADEA's definition of "employer," adding that the term "also means * * * a State or political subdivision of a State." FLSA Amendments

§ 28(a)(2), 88 Stat. 74; see 29 U.S.C. 630(b). "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). This Court has thus previously explained that it "cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." *Ibid.* Here, too, Congress chose to amend Section 630(b)'s definition of "employer" rather than Section 630(a)'s definition of "person," and its choice to forgo a clear alternative path "requires respect, not disregard." *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2072 (2018).

Tellingly, in the same enactment, Congress made the same choice in amending the FLSA—on which parts of the ADEA had been modeled. See *Lorillard* v. *Pons*, 434 U.S. 575, 584-585 (1978). Petitioner does not appear to dispute that the 1974 amendments expanded the FLSA to reach all governmental entities, regardless of their size. FLSA Amendments § 6(a), 88 Stat. 58, 60; see pp. 21-25, *infra*. The natural inference is that, when Congress grouped the ADEA amendments with the FLSA amendments and deviated from the language of the Title VII amendments, it intended the ADEA's coverage of governmental entities to look more like the FLSA's.

3. Petitioner fails to justify departing from the ordinary meaning of the phrase "also means"

Petitioner acknowledges (Br. 27, 35) that the plain-text reading of Section 630(b) is "plausible," or even "ordinary." But it insists (Br. 18) that the phrase "also means" is better read to "signif[y] 'includes' or 'incorporates.'" Petitioner therefore contends (Br. 17-19, 27) that the "persons" described in the first sentence of

Section 630(b) *include* political subdivisions, which are accordingly subject to the 20-employee threshold. That is not the ordinary meaning of the phrase "also means," and other parts of the ADEA do not compel that unusual reading.

a. In ordinary English, the phrase "also means" and the term "includes" perform entirely different functions: "Also means" introduces an additional category that has not yet been addressed, see pp. 9-11, *supra*, whereas "includes" clarifies a preexisting category, see *Black's Law Dictionary* 880 (10th ed. 2014) ("To contain as a part of something."). In petitioner's view, the two collapse here because the word "also" has been defined as "[e]xpressing amplification." Br. 18 (quoting *Oxford English Dictionary* (3d ed. 2011), http://www.oed.com/view/Entry/5740?redirectedFrom=also#eid (*OED*); see Br. 27 (same). But that lone dictionary definition does not give petitioner much of a toehold. The full definition reads: "Expressing amplification: as a further point, item, or circumstance tending in the same direction; further, in addition, besides, as well, too." *OED*. That full definition—describing "a further point * * * tending in the same direction," or a point "in addition" to an initial point, *ibid.*—accords with the ordinary meaning of "also." It does not support petitioner's suggestion (Br. 18) that "also" sometimes means "includes" within or "incorporates" into an already-stated category.

b. Because petitioner cannot escape the ordinary import of the phrase "also means," it encourages (Br. 33-35) the Court to "depart from a standard dictionary definition where compelled by the surrounding text." But petitioner's two appeals to the surrounding text do not justify such an interpretive stretch.

i. The definition of "employer" in Section 630(b) covers in its first sentence "a person engaged in an industry affecting commerce who has twenty or more employees" and in its second sentence "a State or political subdivision of a State." 29 U.S.C. 630(b). Petitioner contends (Br. 20-24) that, regardless of the second sentence, local political subdivisions are already "person[s]" by virtue of the first sentence. To support that contention, petitioner looks (Br. 19-20) to a separate definitional provision, Section 630(a), which defines "person" as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. 630(a). For several reasons, that argument—which petitioner raises for the first time in this litigation, see Pet. App. 5a—fails.

As an initial matter, the definition of the term "person" does not resolve the question presented. Even if the term "person" in Section 630(a) includes governmental entities, that does not alter the plain meaning of Section 630(b)'s second sentence. Assuming that the term "employer" means any person (including political subdivisions) with 20 or more employees, Congress amended the ADEA to make clear that it "also means" any political subdivision, without a minimum-employee requirement. By analogy, consider a park regulation that said: "Only designated animals are allowed in the park. A designated animal means any dog on a leash." Then suppose the park authority amended the regulation to add: "It also means any police dog or service dog." The amendment makes clear that a police or service dog is allowed in the park, whether it is on a leash or not. So too here. Even if petitioner were correct that a political subdivision is a "person" under Section

630(a), it would be subject to the ADEA under Section 630(b), whether it has 20 employees or not.

In any event, petitioner is wrong that governmental entities are among the "persons" listed in Section 630(a). Petitioner asserts (Br. 20-21) that political subdivisions are "organized groups of persons." But the phrase "organized groups of persons" appears at the end of a list of private entities—"individuals, partnerships, associations, labor organizations, corporations, business trusts, [and] legal representatives"—without any mention of governmental entities. When a broad catch-all phrase follows a list of specific examples, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001) (quoting 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17, at 188 (5th ed. 1992)). The phrase "organized groups of persons" thus most naturally covers other private groups. That is especially true because Congress specifically addressed governmental entities elsewhere, in Section 630(b). See *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645-646 (2012).

Petitioner's theory would also create an unsupportable distinction between small state instrumentalities and small local bodies. The term "person" presumptively excludes States or state instrumentalities. See *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000). Because the definition of "person" in Section 630(a) does not expressly mention state entities, those entities are not "persons." On petitioner's reading, then, local governments are "persons" and are subject to the 20-employee

minimum in the first sentence of Section 630(b), while Section 630(b)'s second sentence merely *clarifies* their eligibility. But because States and state instrumentalities are not "persons," the second sentence of 630(b) necessarily *adds* those entities to the list of covered employers, perhaps without applying the 20-employee minimum. Petitioner offers no basis for distinguishing small state and local bodies, when the text of the ADEA treats such entities as a uniform category. See 29 U.S.C. 630(b).

In addition, petitioner's construction of the ADEA would introduce significant surplusage: If political subdivisions already fall within the definition of "person" in Section 630(a), Congress would not have needed to *add* political subdivisions to the definition of "employer" in Section 630(b). Congress could simply have deleted the exclusion for governmental entities, and left it at that. Yet it specified that the term "employer" "also means * * * a State or political subdivision," 29 U.S.C. 630(b), strongly indicating that it did not understand the definition of "person" in Section 630(a) to capture governmental entities. Petitioner counters (Br. 22, 24) that the definition of "person" must include such entities, or the ADEA's current exclusion for the United States and original exclusion for all governmental entities would be superfluous. The more natural inference is that, when Congress enacted the ADEA, it "intended to remove any doubt" that the sweeping new federal statute did not apply to governmental entities (and that the current provision does not apply to the United States). *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008). In any event, petitioner cannot rely on "the canon against superfluity," which "assists only where a competing interpretation gives effect to every clause and word of a

statute," *Microsoft Corp.* v. *i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (citation and internal quotation marks omitted), because his reading does not.

Finally, petitioner asserts (Br. 22-23) that Section 630(c) treats political subdivisions as "persons." The ADEA prohibits age discrimination by an "employment agency," 29 U.S.C. 623(b), which it defines to mean "any person regularly undertaking * * * to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States," 29 U.S.C. 630(c). That definition indicates that an employment agency must be a "person" that "procure[s] employees *for an employer*." *Ibid.* (emphasis added). Because Section 630(b) indisputably defines "employer" to include States and political subdivisions, an employment agency of a State or political subdivision is covered, so long as that employment agency is a "person." For example, Section 630(c) applies to a private recruiting firm hired by a political subdivision. That says nothing about whether the State or political subdivision is itself a "person."

ii. Petitioner next contends (Br. 27-31) that Section 630(b)'s second sentence cannot define governmental entities as a distinct category of "employer" because it also covers agents. That sentence says that "employer" in the ADEA "also means (1) any agent of such a person, and (2) a State or political subdivision of a State." 29 U.S.C. 630(b). In petitioner's view (Br. 28), reading the agent clause as identifying a distinct category of employer is "unfathomable" because it would make agents "*independently* liable for discriminatory employment practices." Far from unfathomable, that is precisely what the clause accomplishes.

The agent clause creates an additional category of covered "employer": outside entities that an employer enlists to handle its employment decisions. Without the clause, such corporate delegates likely could make discriminatory decisions on the employer's behalf without facing any liability, as affected workers would not be the agent's own "employees," 29 U.S.C. 623(a), and the employer itself would not be vicariously liable for the independent contractor's actions, see Resp. Br. 32-33, 36. The agent clause thus prevents employers from outsourcing discrimination and circumventing the ADEA's protections. Indeed, this Court has explained that a similar "agent" clause in Title VII prevents an employer from "avoid[ing] his responsibilities by delegating discriminatory programs to corporate shells." *City of L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 718 n.33 (1978).[1] Petitioner cannot sensibly dispute that the core of the agent clause expands liability to an independent category of "employer."

Nor does petitioner address how Section 630(b)'s minimum-employee requirement would apply to the agent clause under its "clarification" theory. If petitioner is right (Br. 32) that the phrase "also means" merely "clarifies what is included in the definition of 'employer' in § 630(b)'s first sentence," and thus a political subdivision must be subject to the 20-employee

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[1] See, *e.g.*, *Spirt* v. *Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982) ("[D]elegation of responsibility for employee benefits cannot insulate a discriminatory plan from attack under Title VII."), vacated and remanded, 463 U.S. 1223 (1983), reinstated on remand, 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 881 (1984); *Carparts Distribution Ctr., Inc.* v. *Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 17-18 (1st Cir. 1994) (similar, under Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*).

threshold, then agents likewise must be subject to the 20-employee threshold. That would require both the employer *and* its agent to have at least 20 employees to trigger the ADEA's protections. Consequently, the ADEA would not apply whenever a large employer directs a small agent to execute discriminatory practices. A clause designed to prevent circumvention of the ADEA cannot bear such a reading.

Petitioner instead focuses (Br. 28-30) on the peripheral question—not presented here—whether supervisory employees are also subject to independent liability under the agent clause. As an initial matter, it is not clear that the clause reaches individual employees. After all, statutes providing for employer liability already make employers liable for acts of employees within the scope of their duties. See Restatement (Third) of Agency § 2.04 (2006); Resp. Br. 33-34; cf. *Meyer* v. *Holley*, 537 U.S. 280, 285-286 (2003). There is thus no apparent reason why Congress would have swept beyond independent entities to reach an employer's own supervisors. But even assuming it did, those supervisory employees would not necessarily face individual liability. Several courts of appeals have construed the agent clause to reach only employees acting in their official capacities, and thus to permit recovery only from the employer under respondeat-superior principles. See, *e.g.*, *Birkbeck* v. *Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir.), cert. denied, 513 U.S. 1058 (1994); see also *Harvey* v. *Blake*, 913 F.2d 226, 227-228 (5th Cir. 1990) (similar, in Title VII context). Those decisions reflect the presumption that common-law limitations on liability apply unless a statute "speak[s] directly to the question." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (citation and internal quotation marks omitted); see,

e.g., *Burlington N. & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 613-619 (2009) (applying common-law principles to apportion statutory liability); see also *Leykis* v. *NYP Holdings, Inc.*, 899 F. Supp. 986, 990-991 (E.D.N.Y. 1995) (concluding that, because Section 630(b) "d[oes] not specifically state that an agent would be independently and individually liable," it authorizes suits against individuals only in their "official capacities for the purposes of respondeat superior liability"). In any event, the scope of the agent clause at the margins does not alter the fact that the clause clearly introduces an additional category of "employer."

B. The Statutory And Legislative History Confirm The Ordinary Meaning Of Section 630(b)

"Given the straightforward statutory command, there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). But if the Court were to do so, the history of the 1974 ADEA amendments and the accompanying legislative record both support a plain-text reading of Section 630(b).

1. Petitioner contends (Br. 43-49) that the ADEA should track Title VII, notwithstanding the critical textual differences between the two statutes, see pp. 11-13, *supra*, because both statutes "share common substantive features and also a common purpose." Br. 44 (quoting *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995)). "There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions." *Lorillard*, 434 U.S. at 584. But there are also "significant differences," *ibid.*, which courts must give "careful and critical examination," *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 393 (2008).

In particular, the ADEA incorporates several key features of a different statute: the FLSA. The FLSA, which includes the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, also aims to eliminate employment discrimination. See, *e.g.*, *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). And the ADEA's remedies and procedures derive from the FLSA. See 29 U.S.C. 626(b) (incorporating the "powers, remedies, and procedures" of 29 U.S.C. 211(b), 216, and 217); see also *Lorillard*, 434 U.S. at 584-585 (explaining that, as of 1978, "rather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures"). Originally, the Secretary of Labor, who enforces the FLSA, administered and enforced the ADEA as well; Congress transferred that authority to the EEOC in 1978. See Reorg. Plan No. 1 of 1978, § 2, 3 C.F.R. 321 (1978 comp.); Exec. Order No. 12,144, 3 C.F.R. 404 (1979 comp.).

Particularly relevant here, the 1974 amendments that extended the ADEA to governmental employers were part of legislation that also expanded the FLSA's coverage. See FLSA Amendments § 28, 88 Stat. 74; see also *Kimel*, 528 U.S. at 68. That legislation extended the FLSA to "public agenc[ies]," regardless of size. FLSA Amendments § 6(a), 88 Stat. 58, 60; see 29 U.S.C. 203(d) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency."); see also *National League of Cities* v. *Usery*, 426 U.S. 833, 837-839 (1976) (describing 1974 FLSA amendments), overruled by *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Because the FLSA does not include a minimum-employee requirement, it is reasonable to infer that Congress similarly extended the

ADEA to governmental entities without imposing such a requirement. In that way, Congress achieved parity with the FLSA—not with Title VII.

Congress also achieved parity in the ADEA's treatment of covered governmental entities, whether state or federal. Although Section 630(b) excludes the United States from its definition of the term "employer," the 1974 amendments established a separate nondiscrimination provision applicable to the military, federal agencies, and certain other parts of the federal government. See FLSA Amendments § 28(b)(2), 88 Stat. 74. Congress provided that those federal entities "shall be made free from any discrimination based on age." *Id.* at 75; see 29 U.S.C. 633a(a) (Supp. IV 2016). It did not impose a minimum-employee requirement, just as it declined to do in its amendments to Section 630(b). See 29 U.S.C. 633a(a) (Supp. IV 2016); see also EEOC, *Compliance Manual, Threshold Issues*, § 2-III.B.1.a.i n.97 (May 12, 2000), https://www.eeoc.gov/policy/docs/threshold.html (*EEOC Compliance Manual*).

2. The legislative history of the 1974 amendments to the ADEA is sparse, but it likewise supports construing Section 630(b) to cover political subdivisions of any size.

In 1972, Senator Lloyd Bentsen introduced legislation to extend the ADEA to governmental employees. 118 Cong. Rec. 7745 (1972). Senator Bentsen believed that the existing exemption for governmental entities was "unsupportable," as "Federal, State, and local governments should be model employers." *Ibid.* But despite Senator Bentsen's entreaties, Congress did not amend the ADEA. Two months later, after it expanded Title VII's coverage, Senator Bentsen again proposed amending the ADEA. 118 Cong. Rec. 15,894. In so doing, he quoted the Title VII committee report, which

had stated that the "employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy." *Id.* at 15,895 (citation omitted). Beyond that generic statement about extending the ADEA to governmental employees, however, Senator Bentsen never specifically mentioned the ADEA's minimum-employee requirement. And more to the point, Congress again declined to act.

The following year, the Senate Special Committee on Aging issued a working paper that laid the groundwork for amendments to the ADEA. See Senate Special Comm. on Aging, 93d Cong., 1st Sess., *Improving the Age Discrimination Law* (Comm. Print 1973). The working paper noted that "Federal, state and local government employers are not covered" by the ADEA and observed that it is "difficult to see why one set of rules should apply to private industry and varying standards to government." *Id.* at 17. The next paragraph discussed a proposal to lower the minimum-employee requirement from 25 to 20 employees. *Id.* at 18. And a final paragraph "urged that the law be extended * * * to include (1) Federal, State, and local governmental employees, *and* (2) employers with 20 or more employees." *Ibid.* (emphasis added). Contrary to petitioner's characterization (Br. 45), the working paper thus proposed two distinct extensions of coverage: one for governmental employers and one for employers with 20 or more employees.

In 1974, a new Congress amended the ADEA. See FLSA Amendments § 28, 88 Stat. 74. The relevant House Report treated the two ADEA amendments as independent. It noted that the legislation "[e]xtends

the provisions of the Age Discrimination in Employment Act to an employer with 20 or more employees. Also extends the provisions of the act to State and local governments and their related agencies." H.R. Rep. No. 913, 93d Cong., 2d Sess. 16 (1974); see *id.* at 40 (describing the legislation as amending the ADEA "to include within the scope of its coverage Federal, State, and local government employees * * * and to expand coverage from employers with 25 or more employees to employers with 20 or more employees"). It also described the amendment as "a logical extension of the committee's decision to extend FLSA coverage to Federal, State and local government employees." *Id.* at 40; see S. Rep. No. 690, 93d Cong., 2d Sess. 55 (1974) (same). Again, because the FLSA applies to governmental employers regardless of size, see 29 U.S.C. 203(d), the House and Senate Reports appear to envision similar coverage for the ADEA, to the extent they address the issue.

C. Canons Of Construction Do Not Require A Contrary Interpretation

Petitioner offers (Br. 36-43) two canons of construction as support for extending the 20-employee threshold to governmental entities. Neither canon applies here.

1. Petitioner first contends (Br. 37-40) that a plain-text reading of Section 630(b) would contravene the rule that Congress must speak clearly when altering the constitutional balance of federal and state powers. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 462 (1991). The issue in *Gregory* was whether an ambiguous exception to coverage of state employees in the ADEA extended to state judges. *Id.* at 464-467. The Court emphasized that the question touched on "the authority of the people of the

States to determine the qualifications of their most important government officials[,] an authority that lies at the heart of representative government." *Id.* at 463 (citation and internal quotation marks omitted). Because it was "at least ambiguous" whether state judges fell within the ADEA's exception for policymaking officials, *id.* at 467, 470, the Court concluded that the ADEA did not apply without a plain statement by Congress to that effect, *id.* at 470. That "plain statement rule * * * acknowledge[es] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

By its nature, the *Gregory* rule does not apply where a statute is clear, see 501 U.S. at 461; see also *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209-210 (1998), and here the ADEA's text unambiguously covers political subdivisions of any size, for the reasons already discussed. See pp. 8-21, *supra*. But in any event, the *Gregory* canon is a poor fit in this context. The ADEA clearly regulates States and their political subdivisions; the only question is whether Congress intended to regulate such entities with fewer than 20 employees. Petitioner does not explain why the choice among different numerical thresholds would "effect a significant change in the sensitive relation" between federal and state governments. *Bond* v. *United States*, 134 S. Ct. 2077, 2089 (2014); cf. *Wyoming*, 460 U.S. at 239 (explaining that the ADEA's application to state game wardens did not "directly impair the State's ability to structure integral operations in areas of traditional governmental functions") (internal quotation marks omitted). Moreover, the ADEA exposes state agencies only to limited liability, as States are immune from monetary damages in

ADEA suits brought by individuals. See *Kimel*, *supra*.[2] The application of the ADEA here thus bears little resemblance to its application in *Gregory*. At a minimum, the *Gregory* canon has no application in this specific case, which involves a local governmental entity. See *Jinks* v. *Richland Cnty.*, 538 U.S. 456, 466-467 (2003).

2. Petitioner next contends (Br. 40-43) that a governmental entity must qualify as a "person" subject to the 20-employee threshold to avoid constitutional concerns. Petitioner reasons (Br. 41) that if governmental entities constitute a separate category of covered employers, the ADEA would apply "even to state agencies and political subdivisions that have no effect on commerce," in potential violation of the Commerce Clause. To invoke the canon of constitutional avoidance, however, petitioner must identify both statutory language that "is susceptible of multiple interpretations" and "an interpretation that raises serious constitutional doubts." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018). This case satisfies neither requirement.

Again, Section 630(b) is not ambiguous. In an attempt to generate ambiguity, petitioner asserts (Br. 41) that Congress typically "includes a Commerce Clause hook" when regulating public entities. But the two examples that petitioner offers in which federal statutes

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[2] States are not immune from ADEA suits brought by the EEOC. See, *e.g.*, *EEOC* v. *Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 179-180 (4th Cir. 2011); *EEOC* v. *Board of Supervisors for the Univ. of La. Sys.*, 559 F.3d 270, 272-273 (5th Cir. 2009). But suits brought by the federal government, as opposed to damages suits brought by individuals, do not similarly burden state sovereignty. See generally *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 72 (1996) (discussing Eleventh Amendment's limitation on "congressional authorization of suits by private parties against unconsenting States").

apply an express "interstate commerce" limitation to governmental entities include such a limitation because the governmental entities appear alongside private entities. See 42 U.S.C. 2000e(a)-(b) (defining "person" to include "one or more individuals, governments, governmental agencies, political subdivisions," and several private groups); 42 U.S.C. 12111(5) and (7) (defining "person" to have the same meaning as Title VII).[3] By contrast, where a statute independently addresses public entities, Congress ordinarily forgoes an express "interstate commerce" requirement. The FLSA, for example, covers "[e]nterprise[s] engaged in commerce," which it defines to include either an enterprise with "employees engaged in commerce or in the production of goods for commerce," or, without qualification, "an activity of a public agency." 29 U.S.C. 203(s)(1); see 29 U.S.C. 203(x). The Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, likewise covers "any 'public agency,'" without qualification. 29 U.S.C. 2611(4)(A); see 29 U.S.C. 2611(4)(B). Thus, Congress adhered to its ordinary practice in defining the governmental entities covered under the ADEA without reference to interstate commerce.

Nor does petitioner's novel Commerce Clause argument raise any "serious" constitutional concerns under the Court's existing Commerce Clause doctrine. *Jennings*, 138 S. Ct. at 836. This Court has squarely held that the ADEA's application to state and local governments represents "a valid exercise of Congress's powers under the Commerce Clause." *Wyoming*, 460 U.S.

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[3] Even those examples do not support petitioner's argument: Title VII further defines an "industry affecting commerce" to "include[] any governmental industry, business, or activity." 42 U.S.C. 2000e(h).

at 243. Although petitioner discusses (Br. 43) hypothetical "application[s]" of the ADEA to insular local entities, it makes no serious effort to address this Court's precedents evaluating a class of activity's effect on commerce "in the aggregate." *Gonzales* v. *Raich*, 545 U.S. 1, 19 (2005). Petitioner neither attempts to distinguish those cases nor asks the Court to depart from them.

II. THE APPLICATION OF THE ADEA WILL NOT THREATEN SMALL POLITICAL SUBDIVISIONS

Petitioner concludes (Br. 54-57) with a policy argument: that a plain-text interpretation of Section 630(b) "would have devastating effects on small state agencies and political subdivisions." Pet. Br. 54. The United States is sensitive to the needs of small political subdivisions, some of which, as petitioner explains (Br. 11), provide critical public services. But such considerations cannot justify disregarding clear statutory text. See *Lewis* v. *City of Chi.*, 560 U.S. 205, 215, 217 (2010). Moreover, the history of EEOC enforcement of the ADEA, the prevailing practice under state law, and other structural protections all indicate that petitioner's fears about small political subdivisions' survival are significantly overstated.

A. The EEOC has consistently taken the view that Section 630(b) defines "employer" to include political subdivisions of any size. Beginning more than 30 years ago, the EEOC has advanced that view in litigation. See *EEOC* v. *Hudson Twp.*, No. C85-2612A, 1986 WL 6479 (N.D. Ohio Mar. 13, 1986); EEOC Amicus Br. at 4-12, *Kelly* v. *Wauconda Park Dist.*, 801 F.2d 269 (7th Cir. 1986) (No. 85-2390); EEOC Br. at 3-15, *EEOC* v. *Monclova Twp.*, 920 F.2d 360 (6th Cir. 1990) (No. 89-4038). In 2000, the EEOC also issued policy guidance making clear that "[a] state or local government employer is

covered under the ADEA regardless of its number of employees." *EEOC Compliance Manual* § 2-III.B.1.a.i. Consistent with that longstanding position, the EEOC argued as amicus curiae in the court of appeals that the ADEA's 20-employee threshold does not apply to political subdivisions. See EEOC C.A. Br. 4-23.[4]

For decades then, the status quo outside the Sixth, Seventh, and Eighth Circuits (and, more recently, the Tenth Circuit) has been that the ADEA applies to small political subdivisions. The EEOC has accepted charges against such entities and has pursued enforcement actions where appropriate. Yet petitioner's dire predictions about the survival of small political subdivisions have not proved accurate. Indeed, this case arises from only the fifth appellate decision involving the ADEA's application to a small political subdivision since the ADEA was amended in 1974, and only the second appellate decision in the last 20 years. This Court's decision is thus unlikely to prompt a flood of litigation against small political subdivisions, as any floodgates have long remained open in most of the country.

B. One reason there has not been extensive litigation is that most small political subdivisions are subject to state age-discrimination laws. A majority of States prohibit political subdivisions of any size from discriminating on the basis of age, even though some of those

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[4] If Section 630(b) were ambiguous, the EEOC's longstanding, consistent position would warrant deference consistent with its "power to persuade." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); see *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14-16 (2011) (giving weight to EEOC's consistent position set forth in its compliance manual); *Holowecki*, 552 U.S. at 399 (same for EEOC guidance that had "been binding on EEOC staff for at least five years").

same States regulate only private employers of a certain size.[5] That common practice has not eliminated small political subdivisions in those States, as petitioner's own calculations reveal. See Pet. Br. 56 (estimating that over 12,000 political subdivisions employ fewer than 20 employees, based on data from Illinois); 775 Ill. Comp. Stat. Ann. 5/2-101(B)(1)(a) and (c) (West Supp. 2018) (defining "[e]mployer" to include "[a]ny person employing 15 or more employees within Illinois" or "any political subdivision * * * without regard to the number of employees"). Petitioner offers no reason to think that the uniform application of the ADEA to small political subdivisions will have any significant additional impact.

Moreover, the fact that many States prohibit small political subdivisions from discriminating based on age,

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[5] See Alaska Stat. § 18.80.300(5) (2016); Ark. Code Ann. §§ 21-3-201, 21-3-203 (2016); Cal. Gov't Code § 12926(d) (West 2018); Colo. Rev. Stat. § 24-34-401(3) (2017); D.C. Code § 2-1401.02(10) (2016); Haw. Rev. Stat. Ann. § 378-1 (LexisNexis 2016); Idaho Code § 67-5902(6) (West 2018); 775 Ill. Comp. Stat. Ann. 5/2-101(B)(1)(c) (West Supp. 2018); Ind. Code Ann. § 22-9-2-1 (LexisNexis 2010); Kan. Stat. Ann. § 44-1112(d) (Supp. 2016); Me. Rev. Stat. Ann. tit. 5, § 4553(4) (Supp. 2017); Mich. Comp. Laws Ann. § 37.2201(a) (West 2013); Minn. Stat. Ann. § 363A.03(16) (West 2012); Mo. Ann. Stat. § 213.010(8) (West Supp. 2018); Mont. Code Ann. § 49-2-101(11) (2017); Neb. Rev. Stat. Ann. § 48-1002(2) (LexisNexis 2012); N.J. Stat. Ann. § 10:5-5(e) (West Supp. 2018); N.D. Cent. Code § 14-02.4-02(8) (2017); Ohio Rev. Code Ann. § 4112.01(A)(2) (LexisNexis Supp. 2018); Okla. Stat. Ann. tit. 25, § 1301(1) (West Supp. 2018); Or. Rev. Stat. § 659A.001(4) (2017); 43 Pa. Stat. Ann. § 954(b) (West 2009); 28 R.I. Gen. Laws § 28-5-6(8)(i) (Supp. 2017); Tenn. Code Ann. § 4-21-102(5) (2015); Tex. Lab. Code Ann. § 21.002(8)(D) (West 2015); Utah Code Ann. § 34A-5-102(1)(i) (LexisNexis Supp. 2017); Vt. Stat. Ann. tit. 21, § 495d(1) (Supp. 2017); W. Va. Code Ann. § 5-11-3(d) (LexisNexis 2013); Wis. Stat. Ann. § 111.32(6)(a) (West 2018); Wyo. Stat. Ann. § 27-9-102(b) (2017).

even while some of those same States impose minimum-employee requirements for private employers, underscores the rationality of the scheme that Congress adopted. Numerous independent legislatures have concluded that governmental entities should be treated differently under anti-discrimination laws. They may have done so for reasons that the court of appeals surmised, including that small public agencies "can better bear the costs of lawsuits than small private-sector businesses or that government should be a model of nondiscrimination." Pet. App. 16a n.10; see 118 Cong. Rec. 7745 (1972) (Sen. Bentsen) (opining that public entities should be "model employers"). Or they may have concluded that, although intimate private working relationships should be protected from governmental regulation, that rationale does not extend to public employment. See Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 St. John's L. Rev. 1197, 1261-1262 (2006) (explaining interpersonal-relationship justification for Title VII's minimum-employee requirement). Regardless, a number of States have made the same policy decision that small political subdivisions should comply with anti-discrimination laws.

C. Finally, the application of the ADEA to small political subdivisions will not threaten their survival for several structural reasons. First, as previously noted, individuals may not sue States for money damages, blunting any financial impact on small state agencies or instrumentalities. *Kimel*, 528 U.S. at 91; see pp. 26-27 & n.2, *supra*.

Second, financial liability may not fall directly on the political subdivision that discriminates on the basis of age. For example, a small political subdivision may

form part of a larger county or state entity. See, *e.g.*, *Cink* v. *Grant Cnty.*, 635 Fed. Appx. 470, 474-475 (10th Cir. 2015) (treating small sheriff's office as part of county); *Parker* v. *Macon Cnty. Soil & Water Conservation Dist.*, No. 09-CV-2163, 2010 WL 105721, at *5 (C.D. Ill. Jan. 5, 2010) (finding genuine issue of material fact whether small water district was part of state agriculture department). Moreover, the vast majority of public entities participate in insurance pools that cover employment-discrimination lawsuits. See Karen Nixon, Pub. Agency Risk Sharing Auth. of Cal., *Public Entity Pooling—Built to Last* 3 (Dec. 16, 2011), www.cajpa.org/documents/Public-Entity-Pooling-Built-to-Last.pdf (noting that 85% of counties, townships, municipalities, school districts, and special districts participate in risk pools). And in the event that liability falls on the political subdivision itself, it may be able to seek the support of a county or State.

Third, Congress remains free to craft exemptions for entities that it perceives as particularly vulnerable or important. In fact, the ADEA already exempts certain employment actions by political subdivisions performing critical public services, such as fire or police districts. See 29 U.S.C. 623(j) (permitting political subdivisions "to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken * * * with respect to the employment of an individual as a firefighter or as a law enforcement officer," subject to various conditions); see also 29 U.S.C. 630(f) (excluding from the definition of "employee" elected officials, policymaking appointees, and certain staff members); 29 C.F.R. 1625.31 (exempting federal and state programs designed to encourage the employment of "persons with special employment problems").

Such exemptions confirm that Congress is aware of the particular challenges that certain governmental entities may face and is capable of addressing those challenges as they arise.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY B. WALL
Deputy Solicitor General
MORGAN L. GOODSPEED
Assistant to the Solicitor General

JAMES L. LEE
Deputy General Counsel
JENNIFER S. GOLDSTEIN
Associate General Counsel
ANNE NOEL OCCHIALINO
Acting Assistant General Counsel
U.S. Equal Employment Opportunity Commission

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APPENDIX

1. 29 U.S.C. 203(d) provides:

Definitions

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

2. 29 U.S.C. 623 provides in pertinent part:

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

* * * * *

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

* * * * *

3. 29 U.S.C. 630 provides in pertinent part:

Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, cor-

porations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

* * * * *

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees

subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

* * * * *

4. 29 U.S.C. 633a(a) (Supp. IV 2016) provides:

Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

5. 42 U.S.C. 2000e(a)-(b) provides:

Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.